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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1076

DEANE HILL COUNTRY CLUB, INC. and All of Its Members, Claimants (13 Coin-Operated Gaming Devices and Their Coin Contents),
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Deane Hill Country Club, Inc. and all of its members, claimants to the 13 coin-operated devices, and their coin contents, with which this case is concerned, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cause on March 23, 1965.

OPINION BELOW

The opinion of the United States District Court appears on page 21a of the Main Brief on Behalf of Claimants-Appellants with Appendix, filed in the United States Court of Appeals for the Sixth Circuit.

The judgment of the United States Court of Appeals for the Sixth Circuit is annexed hereto as an appendix on page A1.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered March 23, 1965. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

(1) Did the District Court and the Court of Appeals err in refusing to suppress the evidence obtained under a search warrant when the machines and their contents were seized?

(2) Did the Court of Appeals err in holding that there was a violation of Section 7302, Internal Revenue Code of 1954, as amended, such as to authorize forfeiture of the articles in question?

(3) Did the Court of Appeals err in refusing to hold acceptance by the government of the tax, penalties and interest due on the machines, and the issuance of an occupational stamp covering the machines and their operation, after their seizure, constituted a waiver and estoppel of the right to forfeit?

(4) Did the Court of Appeals err in holding that the machines were so identified as to be subject to forfeiture?

(5) Were the machines being used in a "business" or "trade", so as to make petitioners liable for the occupational tax?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 4 to the Constitution of the United States:

> "*Unreasonable searches and seizures.*—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATUTES INVOLVED

The following statutes are involved:

Title 26, U.S.C., Sections 4461(a)(2) and (3), 4462(a)-(2)(A), 4901(a) and (b), 7301(a), and 7302. These statutes insofar as applicable are annexed hereto as an appendix on page A3, *et seq.*

STATEMENT

This is a proceeding *in rem*, wherein the United States filed a libel of information against 13 coin-operated devices and their monetary contents, seeking their forfeiture for a violation of Sections 4461(a)(2) and 4462(a)(2)(A), Internal Revenue Code of 1954, as amended, for their alleged use without the $250.00 occupational stamp having been paid for each machine. The libel of information avers the

machines were operated in violation of Sections 4461 and 4901 I.R.C., 1954, as amended, and subject to forfeiture under Sections 7262 and 7302, I.R.C., 1954, as amended.

An intervening petition and claim was filed by petitioners averring: (1) that the search under a warrant, and seizure of the machines, was unlawful and illegal and the machines were not subject to forfeiture because they were not contraband; (2) that the machines were not being used in violation of any sections of the Internal Revenue Code; and (3) that the machines were not used in a "trade" or "business" as described in the statutes so as to require the $250.00 tax for their operation.

On September 30, 1962, a special agent of the Intelligence Division, Internal Revenue Service, was on premises of petitioners' country club as an invited dinner guest of a member of the country club. While on the premises, the agent took it upon himself to roam and snoop in and about the club premises other than the dining room where he was an invited guest, and he trespassed upon the club premises by entering a room plainly marked by signs, that "Club Members Only" were admissible. While so trespassing, the agent watched persons operating coin-operated machines. He had no search warrant on this occasion. He placed no identifying marks on the machines which he saw in operation. He testified he could not say whether the machines sought to be forfeited at the trial were the same machines he saw in operation.

The occupational tax and the stamp in question is a location tax and stamp, in that one stamp is issued for the operation of the number of machines to be operated on a certain location, and an individual stamp is not issued for each machine. If one machine breaks down, the location may substitute another machine under the same stamp. The day after the agent observed the machines in operation,

he checked with the District Director, Internal Revenue, at Nashville, Tennessee, and received information that the occupational tax had not been paid on the machines at the club. The club premises are in Knoxville, Tennessee, but this agent went to a commissioner in Chattanooga, Tennessee, to obtain a search warrant, and under it seized the machines in question.

On August 31, 1962, approximately one month prior to the time the agent saw the machines in question while a guest, a check in the amount of $3,000.00 had been made out to pay for the occupational stamp, but inquiry had been made of the Internal Revenue office in Knoxville and it was determined that this check was in excess of the tax due. A second check was then made out, but through inadvertence the bookkeeper at the club failed to mail the check.

On October 4, 1962, the date of the seizure, representatives of petitioners went to Nashville, Tennessee and conferred with agents of the Intelligence Division, Internal Revenue Service, and were instructed by this agent to go to the Collector's Office and pay the tax, and this was done. The Collector accepted the tax, interest and penalties and issued a receipt and a stamp covering the machines in question for the tax period in question.

At the trial, the evidence showed that on previous occasions petitioners had been delinquent in payment of the tax and no seizure was made, but the petitioners were simply called upon to pay the tax, interest and penalties, and this was done.

Form 11-B, which is the special tax return required to be made on the machines in question, contains "instructions" to the taxpayer, stating that the law provides penalties for late filing of the return and interest for late payment of the tax.

In addition to the sign on the door to the room where the machines were located, prohibiting entry by other than club members, there was a printed sign on each of the machines which read as follows:

> "TITLE AND OWNERSHIP OF THIS MACHINE IS INVESTED IN THE ENTIRE MEMBERSHIP OF DEANE HILL COUNTRY CLUB. ONLY MEMBERS ARE ALLOWED TO PLAY THIS MACHINE. THE CONTRIBUTIONS MADE THRU THE PLAYING OF THIS MACHINE SHALL BE USED TO FURTHER THE DEVELOPMENT OF OUR CLUB AND ITS FACILITIES, TO PROVIDE ENTERTAINMENT AND TO BE USED FOR THE BENEFIT OF MEMBERS OF DEANE HILL COUNTRY CLUB. MEMBERS ONLY ARE ALLOWED TO PLAY THIS MACHINE. NON-MEMBERS AND GUESTS ARE NOT ALLOWED TO PLAY THIS MACHINE."

The machines were owned by the membership of the club and the proceeds were used for the benefit of the membership and improvement of the club and its facilities.

Motion to suppress the evidence, based upon the illegal search by special agent Leibowitz in view of his obtaining information for the search by trespass, was filed and overruled, and the action of the trial court in overruling the motion to suppress was affirmed by the Court of Appeals.

SPECIFICATIONS OF ERRORS TO BE URGED

The United States Court of Appeals for the Sixth Circuit erred in holding:

(1) That the search warrant under which the machines were seized was valid, and they could have been seized without a warrant, and petitioners were not entitled to their return, if the search were illegal, because the machines were contraband;

(2) That Section 7302, I.R.C., 1954, as amended, authorizes forfeiture of the machines;

(3) That acceptance by the government of the tax, penalties and interest after seizure did not constitute a waiver and estoppel of a right to forfeit;

(4) That the machines were so identified as to be subject to forfeiture; and

(5) That the machines were being used in a "business" or "trade" so as to make petitioners liable for the occupational tax.

REASONS FOR GRANTING WRIT

The Court of Appeals, in spite of the fact that the Internal Revenue agent was a trespasser, held this agent had probable cause, based on his own observations, and even though he were a trespasser could have seized the machines without a search warrant, and that if the search were illegal, petitioners were not entitled to the return of the article because they were contraband. The Court of Appeals also held that intent to defraud was not a necessary element to establish violation of the statutes. The Court of Appeals also states in this opinion:

> "The other questions raised do not in our opinion merit discussion."

The Court of Appeals summarily refused to rule on the other questions raised.

The questions presented here are substantial ones, in that the decision of the Court of Appeals in the instant case is contrary to decisions of this Court and to decisions of the Sixth Circuit. The refusal of the Court to pass on the other questions raised, constitutes a denial to these peti-

tioners of due process. A decision on some questions was important to these litigants and to all others similarly situated, because they were questions of first impression upon which a Court has not ruled. We submit that an appellate court denies the litigant due process of law when it simply states that it is going to ignore a question because it is the opinion of the court that the question does not merit discussion, and gives no citation of authority for such arbitrary refusal to discuss the questions raised. The action of the Court of Appeals in arbitrarily refusing to review the other questions precludes a review in this Court. If a Court may summarily give an arbitrary opinion such as that given here by the Court of Appeals, then all opinions could simply state, "The questions raised do not in our opinion merit discussion. Affirmed."

It is important to these litigations and all other litigants that the Court of Appeals pass on questions raised because, as this Court knows, in most cases filed here certiorari is denied, thus leaving the opinion of the Court of Appeals as the law of the land.

The opinion of the Court of Appeals overlooks the admitted facts of the case, which were that the Internal Revenue agent, when he saw the machines in operation, was a trespasser. There was a sign on the entrance door where the machines were located, which read: "Members Only". The Court of Appeals holds that the fact the door was open to this room when the agent entered, and the fact that no one had ever been ejected from the room but had only been stopped from playing, justified the revenue agent's illegal and unlawful entry. This Court has held that entry by stealth is equivalent to an entry by force, insofar as illegal search is concerned. *Gouled* v. *U. S.*, 255 U.S. 298. The Sixth Circuit held in *Bush* v. *U. S.*, (1960) 283 F.2d 51, that information obtained by a trespasser constitutes entry by

stealth and renders the search unreasonable and void, as being in violation of the Fourth Amendment. The search warrant in the present case was predicated entirely upon what the agent saw through his trespass, and all evidence obtained by him through this illegal entry should have been suppressed. The Court of Appeals states that "the Agent, having observed the illegal operation, could have seized the machines without a warrant." The fact remains, however, that he did not seize the machines at the time, but seized them later under a warrant.

The Court of Appeals held further that had the search been illegal petitioners were not entitled to return of the machines because they were contraband. In none of the Internal Revenue statutes pertaining to the occupational tax involved herein on the machines is it provided that such machines are subject to forfeiture if the tax is not paid. The tax imposed by Sections 4461(2) and 4462(a)(2)(A), Title 26, U.S.C., is a location tax and not one on each machine, and the machines are interchangeable on the same tax stamp when one breaks down. The machines here are not like illegal distilled spirits or narcotics where the tax is imposed on the thing itself. The tax is on the owner or operator of the premises for the number of devices that the owner or operator desires to operate. Furthermore, Form 11-B, which is filed in the record as Exhibit 9, states: ". . . The law provides penalties for late filing of a return and interest for late payment of tax . . .", showing that neither Congress nor the Internal Revenue by its regulations intended there would be a forfeiture of any machine and its contents except for a *willful* violation.

Section 7301(a), Title 26, U.S.C., which is the section upon which this libel was predicated, provides in part as follows:

> "(a) Taxable articles.—Any property on which, or for or in respect whereof, any tax is imposed by this title which shall be found in the possession or custody or within the control of any person . . . *with design to avoid payment of such tax . . . with intent to defraud the United States of such tax or any part thereof*, may be seized, and shall be forfeited to the United States." (Emphasis ours).

Before the machines could be forfeited herein, we submit the government was required to prove that they were used "with design to avoid payment of such tax", and "with intent to defraud the United States of such tax". It is undisputed in this case that the machines were not so possessed and used. The government admitted this. Furthermore, the libel of information charged that petitioners possessed and used these machines "with intent to defraud the United States of the special tax". We submit the burden was on the government to prove intent to defraud the government of the tax due by petitioners. *D'Agostino* v. *U. S.*, (C.C.A. 9, 1958) 261 F.2d 154, cert. denied 79 S. Ct. 739, 359 U.S. 953. The Court of Appeals held in the instant case that "intent to defraud was not a necessary element to establish violation of the statutes".

On the date the machines were seized, the government accepted payment of the tax covering the machines as of September 5, 1962, which preceded the date when the trespassing revenue agent saw the machines in operation (September 30, 1962), and the seizure of the machines October 4, 1962, and licensed these machines until termination of the following fiscal year, to-wit: June 30, 1963.

The Court of Appeals entirely overlooked the question that one of the machines seized by the government was set aside to be used for spare parts and was not even in operation when the agent trespassed and saw machines in

operation. Clearly, the Court of Appeals' decision is erroneous in this respect.

This is a proceeding in admiralty, which means that the machines and their contents were proceeded against rather than an individual, and the theory is that the machines were violating the law. It was incumbent upon the government to prove by a preponderance of the evidence that the machines described in the libel of information were the ones used when the revenue agent trespassed and made his obversation. On the trial, the agent testified:

> "Q. But you can't say they were the same machines, can you, Mr. Leibowitz?
>
> A. No, sir, I cannot say they were the identical machines but they were the same type of machines and the same number of each type."
>
> (61a, Main Brief and Appendix, Court of Appeals.)

Thus, the government was unable to identify the machines as being the ones which the agent said were used to violate the Internal Revenue statutes. We conceive this to be a fatal error in the government's proof.

The $250.00 occupational tax with respect to each machine is imposed upon one who is using said machines in a "trade" or "business". Petitioners reluctantly raised this question because they have always willingly paid this tax. The question is important, however, to operators of all country clubs throughout the United States. There has never been a judicial decision made on this question and the Court of Appeals has refused to give a decision. The machines in question here were owned by the entire membership of the country club and were used solely for the improvement of the club and its facilities, and no individual profited from the operation of the machines. It is our view that the tax due under Section 4901, Title 26, U.S.C., was

meant by Congress to be imposed upon individuals who owned a "trade" or "business" and where the machines were used for personal profit, and that Congress did not intend that the tax be imposed where such machines were used solely for the purpose of upkeep and improvement of country club facilities.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted:

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United States Court of Appeals

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Libelant-Appellee,
v.
DEANE HILL COUNTRY CLUB, INC. and All of its Members,
Claimants-Appellants,
(13 Coin-Operated Gaming Devices and Their Coin Contents)

APPEAL from the United States District Court for the Eastern District of Tennessee, Northern Division.

Decided March 23, 1965.

(Filed March 23, 1965. Carl W. Reuss, Clerk.)

Before WEICK, Chief Judge, CECIL and O'SULLIVAN, Circuit Judges.

PER CURIAM. The Government filed a Libel of Information in the District Court to forfeit thirteen coin-operated gaming devices otherwise known as slot machines, used and operated on the premises of the Country Club without payment of the special tax imposed by the Internal Revenue Laws. The pertinent statutes involved are 26 U.S.C., §§ 4461, 4901(a), 7301 and 7302.

The Country Club filed an intervening petition in which it denied that the machines were used in violation of the Internal Revenue laws and prayed for a return of the machines as not being subject to forfeiture.

The District Judge heard the evidence and in a memorandum opinion discussing the facts and the law ordered forfeiture.

The Country Club contends that the District Court should have sustained the motion to suppress evidence obtained under the search warrant. The ground of the motion to suppress was that the search was with a search warrant upon which there was not probable cause for the issuance thereof.

The evidence disclosed that an Internal Revenue Agent had been invited to dinner at the club house by a member of the Club, and while there, walked through an open door into the room where the machines were being operated. He observed the machines in operation and that no tax stamp was displayed.

The following day the Agent contacted the District Director of Internal Revenue and learned that no return had been filed and no tax paid on the machines. He obtained a search warrant then from the United States Commissioner on his own affidavit based on personal knowledge. The search was made and the machines were seized.

It is argued that the Agent was a trespasser because he had not been specifically invited into the room where the machines were in operation. There was a sign on the entrance door to the room which read "Members Only." The door, however, was open at the time the Agent entered. There was the testimony of the club president that on many occasions persons playing the machines, who were known to be non-members, were stopped. The record does not show that anyone was ever ejected from the room.

In our opinion the search warrant was valid. The Agent who signed the affidavit for the warrant had prob-

able cause based on his own observations. The Agent, having observed the illegal operation, could have seized the machines without a warrant. *Sanders* v. *United States*, 201 F.2d 158 (C.A. 5, 1953).

But even if the search had been illegal, the Country Club was not entitled to a return of the contraband. *United States* v. *$1,058.00 in United States Currency*, 323 F.2d 211 (C.A. 3, 1963); *Interbartolo* v. *United States*, 303 F.2d 34 (C.A. 1, 1962); *United States* v. *Carey*, 272 F.2d 492 (C.A. 5, 1959); *Grogan* v. *United States*, 261 F.2d 65 (C.A. 5, 1958) *cert. denied* 359 U.S. 944; *Bourke* v. *United States*, 44 F.2d 371 (C.A. 6, 1930) *cert. denied* 282 U.S. 897.

An intent to defraud was not a necessary element to establish violation of the statutes. It was sufficient to prove that the machines were used in the gaming operation without payment of the tax. *Voglino* v. *United States*, 253 F.2d 794 (C.A. 4, 1958) *cert. denied* 357 U.S. 919.

The other questions raised do not in our opinion merit discussion.

Affirmed.

STATUTES INVOLVED

Title 26, U.S.C.,

§ 4461. *Imposition of tax*

(a) *In general.*—There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:

* * *

(2) $250 a year, in the case of a device defined in paragraph (2) of section 4462(a); and

(3) $10 or $250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. If one such device is replaced by another, such other device shall not be considered an additional device.

§ 4462. *Definition of coin-operated amusement or gaming device*

(a) *In general.*—For purposes of this subchapter, the term "coin-operated amusement or gaming device" means—

* * *

(2) any machine which is—

(A) a so-called "slot" machine which operates by means of the insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive, cash, premiums, merchandise, or tokens, . .

§ 4901. *Payment of tax*

(a) *Condition precedent to carrying on certain business.*—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461(2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marijuana) until he has paid the special tax therefor.

(b) *Computation.*—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

§ 7301. *Property subject to tax*

(a) *Taxable articles.*—Any property on which, or for or in respect whereof, any tax is imposed by this title which shall be found in the possession or custody or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of such tax, or which is removed, deposited, or concealed, with intent to defraud the United States of such tax or any part thereof, may be seized, and shall be forfeited to the United States.

§ 7302. *Property used in violation of internal revenue laws*

It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1076

DEANE HILL COUNTRY CLUB, INC. and All of Its Members, Claimants (13 Coin-Operated Gaming Devices and Their Coin Contents), PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A3) is reported at 342 F. 2d 794.

JURISDICTION

The judgment of the court of appeals was filed on March 23, 1965. The petition for a writ of certiorari was filed on April 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an incorporated, member-owned country club is required by 26 U.S.C. 4461(a) and

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4901(a) to purchase a gambling tax stamp as a precondition to operating coin-operated gaming machines whose use is restricted to members only.

2. Whether the coin-operated gaming machines and their contents seized from petitioner were properly forfeited.

STATEMENT

On October 4, 1962, agents of the Internal Revenue Service, acting pursuant to a search warrant, seized thirteen coin-operated gambling machines from the premises of petitioner, an incorporated, member-owned country club (R. 44a, 47a–48a).[1] The machines were in operation at the time of the seizure without the required gambling tax stamp being affixed (R. 48a), and petitioner was able to show no evidence that the required tax had been paid (R. 49a). Instead, the agents were shown two checks and a partially-filled out Form 11–B, which omitted both the amount owed and the number of machines in operation (R. 57a–58a).

The warrant for the seizure was obtained by an agent who, on September 30, 1962, had been with his family as an invited dinner guest at the country club (R. 59a). While there he had entered a room with doors open, in which he observed the gambling machines being operated (R. 55a–56a). He thereafter had the records of the acting district director of Internal Revenue at Nashville searched. The

[1] "R." refers to the appendix filed by petitioner in the court of appeals.

search disclosed that no stamp was purchased and no return filed for the machines (R. 56a). An affidavit to this effect was filed with the agent's affidavit for the search warrant (R. 57a).

A sign on the door to the room read "Members Only" (R. 104a), and a sign on each machine stated that only club members were permitted to play it (R. 83a–84a). The club president admitted that non-members may have played the machines from time to time, but he stated that if they were observed doing so they were requested to cease (R. 86a–87a). It was also admitted that there was no policy against guests entering the room to watch the members play (R. 113a–114a).

It was claimed on behalf of petitioner that a return had been filed and a check submitted on August 31, 1962, but that they were returned because the check was for too great an amount, and that a second check for the correct amount was drawn and signed but not mailed because of inadvertence (R. 42a–43a, 78a). However, Internal Revenue procedure is to keep the return and mail back only the check in such instances (R. 73a). There would be a card record of such overpayment and a copy of the covering letter in the files, and a search disclosed neither in respect to petitioner (R. 72a, 74a).[2] On October 4, after the seizure, the president and manager of petitioner flew to

[2] Petitioner had previously failed to pay the tax for the July–December 1961 period (R. 111a). The district court found that the contention that petitioner attempted to pay the tax at the proper time "is supported by cloudy evidence" (R. 24a).

Nashville and purchased a tax stamp retroactive to September 1 (R. 70a).

ARGUMENT

1. Petitioner was clearly required by 26 U.S.C. 4901(a) to purchase a tax stamp as a precondition to operating the machines. Even assuming that use of the machines was effectively limited to members and barred to guests, petitioner, as a corporation, is nevertheless a separate entity from its members.[3] Use of the machines by the members therefore constituted gambling. As the district court pointed out (R. 24a), the benefits which petitioner gained from operation of the machines extended to members who were non-players as well as to those who were players.

2. The warrant for seizure of the machines was properly issued upon probable cause. The agent was an invitee upon the premises, and did not lose that status merely because, having observed the machines in operation through an open door, he entered the room to inspect more closely. The entry was made openly and without stealth. Unlike the agent in *Gouled* v. *United States,* 255 U.S. 298, the agent did not conduct a search or seizure and did not act secretly in the absence of the owners. In light of the testimony

[3] Petitioner attempts to support its contention that § 4901(a) is inapplicable to it by intervening, appealing, and bringing this petition in the name of "all of its members." No individual member, however, has a direct interest in the machines, but only an indirect interest by virtue of his interest in the corporation. There is, therefore, in this case, only one petitioner, not many.

that guests were requested merely to refrain from playing the machines, and not to leave the room (notwithstanding the sign at the entrance), the agent cannot be deemed even a technical trespasser.[4]

The operation of the machines was governed by § 7302, and not by 26 U.S.C. 7301(a) (which deals with sale, removal or concealment of taxable property). Hence, it was necessary to prove only that the tax had not been paid and that the machines had nonetheless been willfully (rather than inadvertently) operated. *Voglino* v. *United States,* 253 F. 2d 794 (C.A. 4), certiorari denied, 357 U.S. 919. The trial court could reasonably draw the inference that the machines in use at the time of the seizure were the same ones which the agent had observed in operation four days previously. More specific identification was not required.

Petitioner, having operated the machines unlawfully, could not undo the offense by paying the tax after seizure. Even had the official who issued the tax stamp been aware of the previous unlawful operation and resultant seizure, he would have been without authority to waive the effect of the relevant statutes. But, in any event, there is no showing that he knew of the seizure at the time that the stamp was purchased.

---

[4] There is no basis for the contention that the agent could lawfully have seized the machines only at the time he observed them in operation but could not use the information thereby obtained as the basis for a warrant justifying a later seizure (Pet. 9). The agent, being alone and off duty, did not have the facilities to seize and remove the machines at the time that he observed them.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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